that it is binding": see *Dick Bentley Production Ltd.* v. *Harold Smith (Motors) Ltd., supra.*

In *Brikom Investments* v. *Carr, supra,* a tenant, relying on the representation made to her by the landlords, that they would repair the roofs at their own expense refused to contribute to the costs of repairs. It was held, *inter alia,* that there was a perfectly good collateral contract bewteen the landlords and her since she had given consideration for the landlords' promise regarding the repairs by entering into the lease in reliance on that promise. "When two parties are about to enter into an agreement for a lease, a lease which imposes on the lessee a very burdensome obligation in respect to repairs, I can see no reason why one party cannot say to the other: 'In relation to those outstanding matters, whatever may be our legal position under the terms of the lease, we will not as landlords enforce that obligation against you.' I see no reason why effect should not be given to such a position. I think the evidence shows that that was the position here; there was a perfectly good collateral contract between these two parties." (*per* Roskill L.J. at page 763).

In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

So it seems to us, following the test of Lord Moulton in the *Heilbut Symons'* case (*supra,* at page 50) that after looking at the totality of the evidence in the present appeal and not from isolated answers given in it, the parties intended or must be taken to have intended that the oral promise was to form part of the basis of the contractual relations between them. The respondents were looking for a place to carry on their eating-shop business. The appellants were only willing to allow them to occupy their premises provided $14,000 tea-money was paid. The respondents would not have paid that substantial sum which is about half the value of the premises but for the promise that they would be allowed to stay there for as long as they wished. The appellants gave such a promise which to our mind against this background plainly amounted to an enforceable contractual promise. In those circumstances, it seems to us that the contract was this: "If we give you $14,000 tea-money, you will ensure that we can stay for as long as we wish"; and the appellants agreed that this would be so. Thus there was a breach of that contract by the appellants when they issued the notice to quit. We do not see how the appellants can escape from the bond of the oral promise which was given and which seems to us to have been given for perfectly good consideration. It may well be asked: why not put the oral promise into the written agreement if it is so important? The short answer is that often people do not behave in this way and the law should accommodate to the needs of ordinary people and not expect from them the responses of astute businessmen. This case seems to us to fall within the principle laid down by A.L. Smith M.R. in *De Lassalle* v. *Guildford*[8]: "The next question is: Was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that the lease did not cover the whole ground, and that it did not contain the whole of the contract between the parties. . . . The present contract of warranty by the defendant was entirely independent of what was to happen during the tenancy."

We would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Goh Soot Hwang & Co.; Singham & Co.*

PERTUBOHAN BERITA NASIONAL MALAYSIA v. STEPHEN KALONG NINGKAN

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 5 & December 27, 1979]

[Kuching — Federal Court Civil Appeal No. 122 of 1979]

Practice and Procedure — Interrogatories — Discretion of Court — R.S.C. 1957, O. 31, r. 2

In this case the respondent took out a suit for libel in March 1973 against the appellant, a news agency. The words complained of appeared in the *Straits Times* of April 19, 1972. The appellant admitted the publication in the *Straits Times* but would not admit doing so to various other persons as claimed by the respondent in Malaysia and Singapore. After the case had been set down for trial, the respondent applied to court for an order to the appellant to answer interrogatories to ascertain the scope of the publication. The learned trial judge allowed the application. The appellants appealed.

Held: (1) the court has an undoubted discretion to grant or refuse interrogatories and in the exercise of its discretion will give leave to such as are necessary for disposing fairly the action or for saving costs;

(2) in this case what the respondent alleged was that the words complained of had been published to "various persons in Malaysia and Singapore" some of whom had printed the alleged libel in their newspapers circulating in these countries. There was no averment that the various persons were unknown to the respondent and no reason was given why with ordinary diligence, such persons could not be ascertained by the respondent without recourse to the court;

(3) in the circumstances the appeal should be allowed and the application for interrogatories refused.

Cases referred to:-

(1) *Ellis* v. *Ambler* (1877) 36 L.T. 410.

(2) *Millar* v. *Harper* (1888) 38 Ch. D. 110.

(3) *London & Provincial Marine Insurance Co.* v. *Davies* (1877) 5 Ch. D. 775.

(4) *Barham* v. *Lord Huntingfield* [1913] 2 K.B. 193.

(5) *Russell* v. *Stubbs* 52 Sol. J. 580; [1913] 2 K.B. 200.

HIGH COURT.

T.O. Thomas for the plaintiff.

John Ko for the defendant.

Cur. Adv. Vult.

Yusoff J.: This is an application for leave by the plaintiff to serve interrogatories on the defendant relating to a libel action alleging that the defendant had published defamatory reports in newspapers against the plaintiff.

The interrogatories sought are in respect of further publication by the defendant of the alleged reports to other newspapers.

The defendant objected to this application on the ground that the pleading in this action has been closed and that discovery would not normally be allowed after the pleading closed and action set for trial. He cited *Ellis* v. *Ambler.*[1] In my view the court may with leave allow interrogatories at any stage of the pleading provided that a party who exhibited unreasonably, may be condemned to bear the cost of such application.

In this application the plaintiff's statement of claim is endorsed at para. 7 thereof that: —

"The defendant wrote and published the said news message to various persons in Malaysia and Singapore and same was printed and published in several newspapers circulating in Malaysia and Singapore."

The defendant is a statutory body with one of the objects to distribute informations, news or news materials or features to subscribers who have entered into arrangements with the defendant — see section 4 and 16 of the Pertubohan Berita Nasional Malaysia (Bernama) Act of 1967.

The names of the subscribers to the news distributed by the defendant are only known to the defendant himself. The plaintiff would not have knowledge of this information. In *Millar* v. *Harper C.A.*[2] it was held that where the defendant has means of knowing the facts in dispute and the plaintiff has not, the defendant is not entitled to particulars until after he is given discovery.

Also in *London & Provincial Marine Insurance Co.* v. *Davies,*[3] it was held that:

"Though great delay had taken place, leave was given to file interrogatories after the close of the pleadings; costs of the application to be costs in the cause."

In the present application basing on these authorities I would allow for interrogatories be served upon the defendant and for the reason that the applicant has unreasonably delayed this application, I would award costs to the defendant in any event.

From the above ruling the defendant appealed to the Federal Court.

FEDERAL COURT.

John Ko for the appellant.

T.O. Thomas for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): At the hearing we allowed the appeal stating that we would give our reasons more fully. We now do so.

The respondent took out a suit for libel in March 1973 against the defendant. In his statement of claim, the words complained of were:

"Chairman of the Sarawak National Party, Dato Stephen Ningkan told the High Court here today that SNAP received $145,000 donations from Kong Thai Sawmill (Miri) Sdn. Bhd.

....

Cross-examined by Mr. C. Darvall, for the respondents, Dato Ningkan said he was aware that money was paid to political parties."

SNAP is the acronym of the Sarawak National Party. The respondent was at all relevant times the chairman. He holds other offices and several distinctions. He was from 1963-1966 the Chief Minister of Sarawak. He is a well-known personality. The appellant is a news agency incorporated under statute and is generally known by another acronym Bernama. It operates by collecting news items which it then circulates amongst newspapers for publication. The words complained of appeared in the *Straits Times* of April 19, 1972. The appellant admitted publishing that report to the *Straits Times* but would not admit doing so to various persons, as claimed by the respondent, in Malaysia and Singapore. As for that, it would put the respondent to "strict proof thereof".

For some considerable time, it did not seem very material to the respondent's case that he should know the various other persons to whom publication was made. It was also quite clear from his statement of claim and also from the constitution of Bernama that those various persons were not persons unknown to him but were other newspapers in Malaysia and Singapore to whom publication was made for the purpose of reproduction. Right from the commencement of the hearing it occurred to us therefore that if the respondent had any real interest in the publication of the words complained of in these other newspapers, he could, with reasonable diligence but without undue labour, have ascertained for himself which other newspapers had published the alleged libel. Then he could have put it to the appellant by appropriate interrogatories whether besides those which had printed the alleged libel there were others who were unknown to him. But, as we remarked earlier, he did not then seem very interested and he did nothing about discovery until on March 5, 1979 after the case had been set down for trial, he suddenly applied to court for an order to the appellant to answer interrogatories to ascertain the scope of the publication. An inevitable result of the application was an adjournment of the case.

The court has an undoubted discretion to grant or refuse interrogatories but in the exercise of its discretion, will give leave to such as are necessary for disposing fairly the action or for saving costs: Order 31 rule 2 Rules of the Supreme Court, 1957.

The appellant objected on two grounds. First, it said it was much too late. Then it said it was merely a fishing expedition. The judge, in a reserved judgment, over-ruled these objections and allowed the application. From his order, Bernama appealed to this court.

Late though it was, we do not, in the circumstances of this case, think the application too late. The defendant can always be compensated by an order for costs and where the application occasions an adjournment, by an order for all costs thrown away. Neither do we see the application as fishing. Where there is nothing in the case to show any foundation for the suggestion that a defendant has uttered any defamatory statements of the plaintiff beyond the one

particularised in the statement of claim and the plaintiff is endeavouring by means of these interrogatories to find out whether the defendant has said the same thing or substantially the same thing to other persons, then an application to administer interrogatories for the purpose of ascertaining whether there are these other persons would be of a fishing character: *Barham* v. *Lord Huntingfield.*[4] But there is in this case something which though not of a sworn nature clearly claims that the appellant had published the libel complained of to other newspapers. It is in fact an inescapable inference from its own constitution and *raison d'etre*. *Russell* v. *Stubbs*[5] is authority for the proposition that if a plaintiff can satisfy the court that there has been in fact a publication to other persons whose names are unknown to the plaintiff, then the court may order interrogatories to be directed to the defendant as to the names of these other persons.

But in our view, there is a clear distinction between persons unknown to the respondent to whom the publication is alleged to have been made and "various persons in Malaysia and Singapore" some of whom had printed the alleged libel in their newspapers circulating in these countries. There is no averment that these various persons were unknown to the respondent and no reason is given why with ordinary diligence, such persons who are of a very restricted class could not be ascertained by the respondent for himself without recourse to the court. If his purpose is for the proper assessment of damages and it is necessary for this purpose, then he should, in the circumstances of this case, obtain the proof himself. If it be for the purpose of taking action against such publishers of the alleged libel, then it is much too late: section 6 Limitation Ordinance, 1953, but it is also to be observed that to date he has taken no action against the *Straits Times*.

For these reasons, we allowed the appeal with costs here and in the court below.

Appeal allowed.

Solicitors: *Battenberg & Talma; Thomas & Co.*

SIM SIOK ENG v. KONG MING BANK BERHAD

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 5 & December 27, 1979]

[Kuching — Federal Court Civil Appeal No. 84 of 1979]

Limitation — Claim on overdraft by bank — No demand necessary to start time from running — Claim statute barred Limitation Ordinance, Schedule arts. 40 and 101.

Banking — Overdraft by bank — Secured by charge on lands — Overdraft exceeding maximum under charge — Claim by bank on overdraft — Limitation — Limitation Ordinance, Schedule, arts. 40 and 101.

In this case the respondent bank had given an unsecured overdraft accommodation to the appellants. Subsequently in order to increase the overdraft the appellants charged his lands to the bank to secure the repayment on demand of the overdraft up to a maximum of $90,000. The overdraft was allowed to exceed $90,000 and the account lay dormant from 1974. In 1978 the bank brought an action for the repayment of the whole of the sum owing on the overdraft. The defence was limitation as under Article 40 of the schedule to the Limitation Ordinance, the period of limitation for money lent on an agreement that it should be payable on demand was three years from the date of the loan. It was argued by the respondent bank that the "on demand" provision of the charge made demand an absolute necessity for the claim on the overdraft and therefore time did not run against the Bank until a demand was made and repayment refused. The learned trial judge held that the demand made by the respondent bank just before taking out the suit gave it a cause of action. The appellant appealed.

Held: the respondent-bank could not in this case claim that the simple contract debt of an overdraft was merged into the charge and as the claim in this case was on the overdraft, the claim was statute barred, as in the absence of any stipulation for a demand for repayment on the overdraft, time ran from the date of the loan or from the last payment of interest or part payment of capital, if paid before the end of the prescribed period, which was three years.

Cases referred to:-

(1) *Bian Chiang Bank Berhad* v. *Kwong Hing Cheong* [1978] 2 M.L.J. 193.

(2) *Joachimson* v. *Swiss Bank Corporation* [1921] 2 K.B. 110.

(3) *Parr's Banking Co.* v. *Yates* [1898] 2 Q.B. 460.

(4) *Ram Chunder Ghosaul* v. *Juggutmonmohini Dabee* (1878) I.L.R. 4 Cal. 283.

(5) *Norton* v. *Ellam* 2 M. & W. 461; 150 E.R. 839.

(6) *Ramdin* v. *Kalka Pershad* (1884-1885) L.R. 12 I.A. 12.

(7) *Barclays Bank Ltd.* v. *Beck & Anor.* [1952] 1 All E.R. 549.

(8) *Stamps Commissioner* v. *Hope* [1891] A.C. 476.

FEDERAL COURT.

Foo Kim Jiong for the appellant.

Chew Pok Oi for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): We allowed the appeal at the hearing and now give our reasons.

The appellant, while a customer of the respondent Bank, was given an unsecured overdraft accommodation. In the language of the banking world, it was a clean overdraft. Perhaps because of this, it was for a modest amount of $3,000. In August, 1970, the appellant required substantially greater facilities and by creating a charge on lands belonging to him to secure the repayment on demand of "the fluctuating overdraft or otherwise up to a maximum extent of $90,000," managed to obtain an increase of the limit of the overdraft to this maximum.

All would have been well and the Bank would have been able to rely on the period of twelve years which it had for the repayment of the balance standing in this overdraft account by foreclosing of the charge without being confronted with the defence of limitation if the overdraft had remained at the level of $90,000, since Article 101 of the Schedule to the Limitation Ordinance (Cap. 49, Sarawak) provides:

"101. To enforce payment of money charged upon immovable property... the limitation period is 12 years when the money sued for becomes due."

But, for one reason or another, the principal sum due on November 4, 1974 had been allowed to mount up to $194,959.12. It would have been considerably more, by another third, but for the repayment of a sum of $65,000 made by the appellant on a partial discharge of the security charged to the Bank.

Thereafter the account lay dormant. The appellant did not make a single payment and the only